In The

Supreme Court of the United States

October Term 1972

No. 72-

72-117

JOHN IANNELLI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

JUL 21 1972

MICHAEL RODAK, JR., CLERK

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

Petitioner prays that a Writ of Certiorari issue to review an order of the United States Court of Appeals affirming the judgment of the United States District Court for the Southern District of New York convicting him of misapplication of federally insured bank funds (18 U.S.C. §656) and conspiracy to misapply such funds (18 U.S.C. §371).

Opinion Below

The opinion of the United States Court of Appeals rendered the 22nd day of May, 1972, appears as an appendix to this petition.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Court of Appeals for the Second Circuit denied a petition for rehearing on the 19th day of June, 1972.

Questions Presented

1. Whether a deliberate delay in proceeding to indictment of almost five years after the Government learned of the facts relevant to the indictment, constituted a violation of petitioner's rights to a speedy trial and to due process under the Fifth and Sixth Amendments of the United States Constitution?

2. Whether there was sufficient evidence as a matter of law to have warranted a conviction in view of the fact that the main Government witness exonerated the petitioner?

Constitutional and Statutory Provisions Involved

The Fifth and Sixth Amendments of the United States Constitution and 18 U.S.C. §§371 and 656, and Rule 48(b) F.R. Cr. P. are involved herein.

Statement of the Case

The petitioner was indicted along with John Tortora and Frank Squires, charged with the aforesaid crimes. The case originates in 1965, at which time petitioner, John Iannelli, had a personal checking account and certain commercial loans outstanding with the County Trust Company in Yonkers, New York.

Walter J. Michaels, an Assistant Treasurer of the bank, handled these loans on behalf of the bank.

The witnesses at trial, called by the prosecution, failed completely to establish that petitioner, John Iannelli, had committed the crimes charged in this case.

The main witness of the Government was Walter J. Michaels, who was the Acting Manager of the County Trust Company branch from which the alleged misappropriation of moneys had occurred. This witness, we submit, for the most part testified truthfully.

Since he was the main Government witness, it is submitted that the prosecution necessarily vouched for his credibility.

By dint of the testimony of Michaels, it is manifest that Iannelli was exonerated rather than inculpated. Paradoxically as this may appear to be, it is nevertheless obvious from the record that Michaels conceded that he was never asked to misappropriate funds by Iannelli and that the juggling of loans and accounts (taking from Peter to pay Paul) was his own idea and not the suggestion or solicitation of Iannelli.

The Court itself was hard pressed to determine whether or not it should grant a motion to dismiss before submission to the jury. We maintain that the only fair result should have been to dismiss the charges as being insufficient in law.

The substance of the case involves the alleged manipulation by Michaels of certain loans and deposits on behalf of Sioux Realty Corp., Iannelli, and others. There were overdrawings and other problems which arose in large measure because of the arbitrary adjustments of various accounts at the County Trust Company by Michaels.

It appears that Michaels was motivated by legitimate desires to prevent loss of interest to the bank and to satisfy customers of that institution. In doing so however, he arrogated to himself the authority to debit and credit various accounts without the prior knowledge or approval of the depositors. If any crime was committed therefore, it would appear that the only one who was involved was the co-defendant, Michaels, who quite frankly admitted his guilt prior to the trial by pleading guilty.

If there were any conspiratorial arrangements, they existed among Michaels and persons other than Iannelli, since Iannelli, under any view of the facts, cannot be deemed involved either in the conspiracy or in the substantive violations.

No one in the entire trial offered any incriminating evidence against the petitioner but, on the contrary, he was exonerated from any culpability.

At most it would appear that the bank officer, Michaels, who was the main Government witness, was juggling accounts for purposes of his own and perhaps with good motivation but, unfortunately, the petitioner became involved with the authorities after the facts of this juggling became known.

The quintessence of Michaels' position is epitomized by the colloquy between himself and Iannelli's attorney (155a, 156a):

> "Q. Would you attribute this, sir, to the fact that on your own you were juggling these various accounts. I use that term. If you don't understand, then just tell me that. I will withdraw the question.
>
> "Q. Is it not a fact, Mr. Michaels, from your testimony, that it was your decision at times to take money which might have been credited to one account and instead credit it to another account? A. Yes.
>
> "Q. Because that account was a little down; isn't that so? A. Yes.
>
> "Q. Mr. Iannelli never told you to do this, did he? A. No.
>
> "Q. You did this upon your own? A. Yes.
>
> "Q. And you did it as you had done it for years gone by; isn't that so? I am not speaking only of Mr. Iannelli, but of other accounts in the bank. A. I would not say it was years. It was not years.
>
> "Q. I will withdraw that portion of the question. You had done it for other accounts? A. Yes.

"Q. It was your opinion that this was a service you were doing both for the customer and also for your employer? A. Yes, because I felt that I would be paid eventually for the amounts that were involved.

"Q. In about March, Mr. Iannelli, up to this point had some personal accounts, he came in and made an application or opened up the Sioux Construction account; is that correct? A. Yes.

"Q. Of course, this came as no surprise to you because you knew him to be a general contractor; is that correct? A. Correct.

"Q. When a particular check came back with insufficient funds from the First National Bank, you decided upon your own when some funds did come in, to misapply those funds using — rather, apply those funds to one account rather than the account to which he had deposited it; isn't that so? A. Yes, I decided to debit the account of Sioux Construction Company.

"Q. Shortly thereafter, you spoke with Mr. Iannelli in connection with this and he in effect told you he did not want that to be done; right? A. Yes.

"Q. Despite that admonishment, you continued to do this; isn't that so? A. Yes."

Moreover, Michaels declared that he never believed that he was doing anything wrong and that he never intended to defraud the bank. As a matter of fact, Michaels asserted that everything he did in connection with the Iannelli matter, he

believed to be "perfectly legitimate." Thus, at page 158a of the record, Michaels responded as follows:

"Q. These people qualified, did they not? A. Yes.

"Q. And you gave them a loan; right? A. Yes.

"Q. Was it ever your intention to defraud the bank? A. No, sir.

"Q. In fact, you never discussed defrauding the bank with anyone, did you? A. No.

"Q. In fact, you would not have defrauded the bank? A. No, sir.

"Q. You never agreed with anyone to defraud the bank? A. No.

"Q. And in fact if anyone had asked you, you would not have done so; isn't that so? A. That's correct.

"Q. So, therefore, all of the negotiations which you have discussed with us this morning were in your estimation, your opinion, purely legitimate; isn't that so? A. Yes.

"Q. However, you took it upon yourself to take monies which were given to you as cash from these negotiations and place them into accounts which you felt were short; is that correct? A. Yes.

"Q. Because you wanted to protect the customer and it was your desire to protect your employer; true? A. Yes.

"Q. In fact, in dealing with Mrs. Bove, there you did that entirely upon your own; isn't that true? A. Yes.

"Q. I believe you testified that you apprised Mr. Iannelli at some later time of this Bove transaction; is that so? A. I told him that I had gotten a loan, but I didn't mention any names.

"Q. And you told him after the entire transaction was completed; isn't that so? A. Yes."

The remainder of the colloquy is also extremely revealing (159a-164a).

The conclusion of Michaels' testimony on cross-examination by Iannelli's lawyer reveals that he felt that he was acting perfectly properly at all times (162a-163a):

"Q. Aside from the people we have discussed here this morning, and as you have already testified when Mr. Hartmann was examining you, there were many other accounts that you in effect did the same courtesy for; isn't that so? A. Yes.

"Q. And if those accounts were short, you in effect — and I am using this term loosely — you would take from Peter to pay Paul, so to speak; is that correct? A. Yes.

"Q. But it was always your intent that the accounts would be balanced, you would service these clients or customers whom you considered to be good customers in the community; correct? A. Yes.

"Q. And, of course, you felt that you were servicing your employer, correct? A. Yes.

"Q. It was never their intent to defraud the bank as far as you knew; correct? A. Yes.

"Q. They never suggested you defraud the bank; is that correct? A. That's correct.

"Q. And you never and would never have permitted the bank to be defrauded; isn't that so? A. Yes."

To analyze the testimony of Michaels, therefore, is to recognize that he exonerated Iannelli completely. His testimony precludes the finding of wilfullness or criminal intent.

Even Anthony Cucciarre, the auditor for County Trust Company, stated that his analysis of what Michaels had done clearly revealed that Michaels had borrowed from Paul to pay Peter (228a-231a).

One Joseph Aiello indicated that he had no connection with Iannelli and yet, through Michaels' juggling, he was able to obtain a loan and that loan had absolutely nothing to do with petitioner (253a-256a).

Argument

Point I.

SINCE THE MAIN GOVERNMENT WITNESS, MICHAELS, EXONERATED PETITIONER AND NO OTHER TESTIMONY INCULPATED HIM, IT IS SUBMITTED THAT THE COURT SHOULD HAVE DIRECTED AN ACQUITTAL AS REQUESTED BY COUNSEL.

This is a strange case indeed since the evidence was exculpatory rather than incriminating. The main Government witness, a bank officer by the name of Walter Michaels, had allegedly made loans to certain people, including Iannelli. He frankly admitted however, that he had juggled accounts thinking he was acting in the interests of his employer, the County Trust Company, but actually he was misapplying Federally insured funds. Admittedly, Iannelli never authorized any juggling.

As is quoted in the facts of this petition, Michaels exonerated petitioner completely. The proof was therefore insufficient as a matter of law.

In the case at bar, Iannelli did not take the stand and thus it could not be said that he supplied the necessary evidence to inculpate him (United States v. Carabbia, 381 F.2d 133, 138 [6 Cir. 1967]).

We maintain that thus a review of all the evidence in the case leaves no doubt but that there was insufficient evidence adduced to warrant a conviction (United States v. Rosengarten, 357 F.2d 263, 266 [2 Cir. 1966]).

Argument

We recognize, of course, that a motion for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure is similar to a motion for directed verdict (Lelles v. United States, 241 F.2d 21 [9 Cir. 1957], cert. denied 353 U.S. 974).

The fact that the circumstances create suspicion is not sufficient to warrant a conviction (Montoya v. United States, 402 F.2d 847 [5 Cir. 1968]; Lewis v. United States, 420 F.2d 1089 [10 Cir. 1970]; McMillian v. United States, 399 F.2d 478, 479 [5 Cir. 1968]; Rodgers v. United States, 402 F.2d 830, 834, n. 2 [9 Cir. 1968]).

We are not merely arguing that the Court might draw contrary conclusions, but, rather, the petitioner maintains that there was insufficient evidence upon which a conclusion of guilt could be predicated (United States v. Manuel-Baca, 421 F.2d 781 [9 Cir. 1970], cert. denied 399 U.S. 933). Nor are we asking the Court to view the verdict in an extraordinary manner since we recognize that it must be applied in a manner most favorable to the Government. Even with this standard, however, Iannelli contends that the case is insufficient (Simmons v. United States, 406 F.2d 456 [5 Cir. 1969]).

Moreover, the prerequisite that a motion under Rule 29 be made in the Court below was complied with in the case at bar (Picciurro v. United States, 250 F.2d 585 [8 Cir. 1958]; Tomley v. United States, 250 F.2d 549 [5 Cir. 1958], cert. denied 356 U.S. 928).

Argument

The Court will recall that the main witness for the prosecution was Walter Michaels, the Acting Manager who apparently controlled loans at the County Trust Company branch involved herein. He testified quite forthrightly and conceded that he had pled guilty prior to the trial because he was guilty.

In the colloquies and cross-examination, Michaels frankly admitted that Iannelli never asked him to do anything illegal or improper; that he had done nothing knowingly illegal or improper and that the juggling of loans and accounts had been his own idea. He stated further that not only did Iannelli lack knowledge of what he was doing, but when he found out that Michaels was "borrowing from Peter to pay Paul" by juggling loans and accounts, he forbade Michaels from doing it. Michaels testified, however, that he ignored this admonition and continued anyway (156a-158a).

There is thus nothing in the record to suggest that Iannelli was guilty within the purview of the statute which, of course, requires that the individual act wilfully. It can be inferred that under the circumstances of this case Iannelli not only did not act wilfully, but was unaware of the misapplication of funds by Michaels. Certainly he was not acting as a co-conspirator with Michaels in this regard. Conspiracy also requires criminal intent.

Argument

Point II.

THE PETITIONER WAS PREJUDICED AS A MATTER OF LAW BY THE UNEXPLAINED DELAY OF ALMOST FIVE YEARS BETWEEN THE TIME THE GOVERNMENT LEARNED OF THE FACTS CONSTITUTING THE CRIME, AND THE INDICTMENT. BOTH THE FIFTH AND SIXTH AMENDMENTS WERE THUS OFFENDED AND PREJUDICE SHOULD BE PRESUMED.

The indictment herein was returned almost five years following the discovery of the events which constituted the predicate for the true bill. The District Judge entertained motions to dismiss for lack of speedy prosecution and denied them on the merits.

The Statute of Limitations here is only five years and there does not appear to have been any plausible reason advanced by the prosecution as to why the delay occurred. There can be no doubt but that the petitioner was lulled into a false sense of security, lost contact with possible witnesses, suffered a dimming or loss of memory and possibly failed to preserve documents or memoranda which could have been helpful (Pollard v. United States, 352 U.S. 354, 361-362 (1957); United States v. Provoo, 350 U.S. 857 (1955); Mann v. United States, 304 F.2d 394, 396-397 [D.C. Cir. 1962]; Klopfer v. North Carolina, 386 U.S. 213 [1967]; and United States v. Marion, 40 U.S. L.W. 4092 [December 1971]).

In United States v. Richardson, D.C.N.Y. 1968, 291 F. Supp. 441, 444-445, the Court ordered dis-

missal where the Government offered no explanation for the delay of four years and failed to rebut the assertion that the indictment must have lain dormant in the back of someone's desk drawer. See also, United States v. Mann, D.C.N.Y. 1968, 291 F. Supp. 268, 270-271.

Accord: United States v. Skinner, D.C.N.Y. 1969, 308 F. Supp. 1221. See also, concurring opinion of Justice Brennan in Dickey v. Florida, 398 U.S. 30, 50-52 (1970).

See also, People v. Winfrey, 20 N.Y.2d 138, 141; and People v. Minicone, 28 N.Y.2d 279, cert. denied ___ U.S. ___, 1971.

In Dickey v. Florida, supra, Justice Brennan cogently noted:

> "... the equation of silence or inaction with waiver is a fiction that has been categorically rejected by this Court when other fundamental rights are at stake. Over 30 years ago in Johnson v. Zerbst, 304 U.S. 458, 464 ...(1938), we defined 'waiver' as 'an intentional relinquishment of a known right or privilege.' We have made clear that courts should 'indulge every reasonable presumption against waiver,' and that they should 'not presume acquiescence in the loss of fundamental rights.'...
>
> "A negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right as a purposeful failure...."

Argument

In 1844, an English Judge dealing with a problem similar to that presented herein, opined very aptly (Regina v. Robbins, 1 Cox C.C. 114):

> "I ought not to allow the case to go further. It is monstrous to put a man on on his trial after such a lapse of time. How can he account for his conduct so far back?... [I]f the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on trial." (Emphasis supplied.)

See,

> 5 Stan. L. Rev. 95, 104, 1952 "Justice Overdue — Speedy Trial for the Pre-Trial Defendant."

Moreover, there is no way a suspect can compel or insist that the Government commence a prosecution; nor can a defendant determine when or if the Government may decide to prosecute. The "Sword of Damocles" may hang for the whole period of limitations!

In Pollard v. United States, 352 U.S. 354, 361-362 (1957), the Supreme Court not only equated "purposeful" delays with the "oppressive" ones forbidden by the Sixth Amendment, but also interpreted United States v. Provoo, 350 U.S. 857 (1955), affirming Petition of Provoo, D. Md., 17 F.R.D. 183 (1955), as condemning delay "caused by the deliberate act of the Government."

Argument

It is apparent from Pollard v. United States, supra, at 352 U.S. at 361, that the Supreme Court indicates that even an indictment within the limitation period may come too late to square with the Sixth Amendment. (See Mann v. United States, supra, 304 F.2d at 396-397, n. 4; Taylor v. United States, 238 F.2d 259 [D.C. Cir. 1956]; Nickens v. United States, 323 F.2d 807 [D.C. Cir. 1963]; United States v. Provoo, supra.) See 18 U.S.C. §3282.

In Godfrey v. United States, 358 F.2d 850, 852 (D.C. Cir., 1966), the Court of Appeals observed:

> "We note that although the total lapse of time from offense to arrest was about four months, two months of that period was not protected, in terms of reasonableness, by any purpose to advance the public interest in effective law enforcement. The District Court appears to have been of the view that, where delay to serve the purpose of the public occurs, with inevitable impact upon the interests of the accused, there is an obligation on the police to be as diligent as possible in making the arrest, to the end that the accused may know as soon as possible of the charge against him. We agree. The disadvantage to the accused inherent in the deliberate preference accorded the public interest in the one period should not be compounded by a failure to exercise appropriate diligence in the other."

Argument

In United States v. Godfrey, 243 F. Supp. 830, 831 (U.S.D.C., D.C. 1966), the District Court received the case on a remand from the United States Court of Appeals for the District of Columbia, for the purpose of determining,

> "The reasonableness vel non of the delay occurring between the dates of the alleged offense by appellant, the filing of the complaint, and the issuance of the arrest warrant, and the appellant's arrest, and the effect, if any, on the defense of the case ...."

See also Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965). In Ross, the Court of Appeals (249 F.2d at 211) proclaimed:

> "... We think a record of this kind more accurately may be deemed as presenting a question akin to a Fifth Amendment due process issue, centering around Appellant's ability to defend himself."

See People v. Winfrey, supra,

In Ross, the Court observed that a delay between the commission of the offense and the prosecution of a protracted nature might well constitute a denial of due process of law. It should be noted that in Ross v. United States, supra, the Court was not merely articulating its supervisory power over district courts in Washington, D.C.

Argument

In Hanrahan v. United States, 348 F.2d 363 (D.C. Cir. 1965), the Court of Appeals declared (id. at 366):

> "Rule 48(b), Fed. R. Crim. P., if in the Sixth Amendment, in terms requires the prosecutor to proceed without 'unnecessary delay.' The prosecutor's responsibilities under these provisions begin, not when the indictment is returned, but when the prosecution is begun."

See also 2 Pomeroy, Equity Jurisprudence, §§418, 419 (5 Ed. 1941); 2 Story, Equity Jurisprudence, §1526 (13 Ed. 1886).

In Lustman v. United States, (2 Cir. 1958), 258 F.2d 475 this Court held that where the delay is long, prejudice may be implied (id. at 477-8):

> "...A showing of prejudice is not required when a criminal defendant is asserting a constitutional right" (citing cases).

The Court continued:

> "Thus we assume that the unexcused delay of approximately four years was an undue delay within the meaning of the Sixth Amendment even though appellant has not shown that it prejudiced him in the prosecution of his defense." (Emphasis ours.)

It is therefore submitted that the indictment herein should be dismissed despite the fact that

actual prejudice was not conclusively demonstrated. We submit that a delay as long as this cannot be deemed inadvertent but, of necessity, has to be considered "purposeful." The rules of the Court leave no doubt that such a delay is unconscionable.

It should also be noted that Rule 48(b) of the Federal Rules of Criminal Procedure imposes more stringent standards than does the Sixth Amendment (United States v. De Leo, 422 F.2d 487, 495 [1st Cir. 1970], cert. denied 397 U.S. 1037; United States v. Dallago, [D.C. N.Y. 1970], 311 F. Supp. 227, 231, 233).

A four-year delay, for example, was deemed conclusively unnecessary and warranted dismissal (United States v. Blanca Perez, [D.C. N.Y. 1970], 310 F. Supp. 550).

The duty appears to be upon the United States Attorney to prosecute without delay and not dependent in all cases upon demands of the defendants (Hodges v. United States, 408 F.2d 543 [8 Cir. 1969]; United States v. Mark II Electronics of La., Inc., [D.C. La. 1969], 305 F. Supp. 1280).

United States v. Marion, 404 U.S. 307 (1971) was apparently the basis upon which the Circuit Court decided to affirm. Since then, of course, this Court has had occasion to consider a later case, namely Baker v. Wingo, ___U.S. ___, (decided June 22, 1972), 11 Cr. L. 3174.

In Baker v. Wingo, supra, this Court affirmed but held that a defendant's Constitutional right

to speedy trial cannot be established by any inflexible rule but can be determined only on an ad hoc balancing basis, in which the conduct of the prosecution and of the defendant are weighed. The Court should assess such factors as the length of and the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

It is submitted that in the case at bar the prosecution virtually conceded that it had no specific reason for the delay except that perhaps it was remiss in bringing it before the Grand Jury.

We do not believe that Marion can be read as permitting an arbitrary delay by the prosecution in violation of Rule 48(b) F.R. Cr. P. and the Fifth and Sixth Amendments.

We ask the Court rhetorically, of course, whether it would agree that a person's memory of past events is likely to be more accurate several months after the event or five years after the event? We of course believe the answer is obvious and, therefore, submit that this fact in itself warrants a conclusion that prejudice occurred in this case.

It is difficult to pinpoint actual "prejudice" because events may have occurred which were forgotten or which were not given significance owing to the ignorance on the part of the petitioner that an indictment would eventually be sought. As was stated in the brief below in this case, the

delay is even more virulent where a defendant is unaware that charges are pending than where he is aware of those charges. In the former case, he has no reason to preserve papers or keep in touch with persons who may be of help and, in general, lapses into a feeling of complacency. In the latter situation, at least the defendant is aware of the charges and can make efforts to preserve his records, keep in touch with possible witnesses and prepare to defend himself eventually.

We would ask the Court to consider the recent case of United States v. Vuitch, 402 U.S. 61, where the Supreme Court indicated that the Government must carry the burden of proof in all cases. Even where there may be an affirmative defense, the Government must disprove its existence.

In essence, the ruling of the Court below means that despite the fact that a defendant raises the issue of speedy trial under the Constitution and asserts a denial of Rule 48(b) F.R. Cr. P., the burden rests upon the defendant to prove that the Government denied him a speedy trial to his prejudice and it is not enough that he prove that speedy justice was simply denied.

In other words, although in the case at bar there is a classic situation of an unconscionable delay without justification in bringing a case to trial, the Court below reasons that because the petitioner failed to prove he was actually prejudiced, that no violation has occurred.

Argument

We would ask what is the significance of the Fifth and Sixth Amendments if this is the way the speedy trial provision is to be interpreted! What the Marion case has accomplished is an actual repeal of the Sixth Amendment right to speedy trial without the necessity of going through the elaborate procedures necessary to amend or change the Constitution.

The Circuit Court decision herein perhaps presages a calculated design to delay indictments until the eve of the expiration of the Statute of Limitations since it is manifest that such delays ordinarily work to the benefit of the Government and seldom, if ever, benefit the defense. Since memories cannot possibly be as fresh after several years as they are after several months, that fact alone should be deemed prejudicial under the circumstances of this case.

We would also respectfully point out that placing the burden of proof of denial of speedy justice with prejudice upon the defendant, may violate the self-incrimination clause of the Fifth Amendment since such proof oft-times can be adduced only through the testimony of the defendant and where a defendant elects not to testify under the Fifth Amendment, he may find himself in the dilemma of having to waive his Sixth Amendment rights. No person accused of a crime should be placed in such a predicament.

Conclusion

The Petition for Certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

APPENDIX

Judgment of Affirmance of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of May, One Thousand Nine Hundred and Seventy-Two.

Present:

Hon. Sterry R. Waterman,
Hon. Paul R. Hays
Hon. Wilfred Feinberg,
Circuit Judges.

- -x

UNITED STATES OF AMERICA, :

Plaintiff-Appellee, :

v. :

JOHN IANNELLI, JOHN TORTORA a/k/a JOHNNY T., and FRANK SQUIRES a/k/a FRANK SPEARS, :

Defendants-Appellants. :

- -x

Appeal from the United States District Court for the Southern District of New York.

Judgment of Affirmance of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

R. DANIEL FUSARO
Clerk

Order

71-2123

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- -x

United States of America, :
Plaintiff-Appellee, :

v. :

John Iannelli, John Tortora, Frank Squires, a/k/a Frank Spears, Walter J. Michaels, :
Defendants, :

John Iannelli, John Tortora, Frank Squires, a/k/a Frank Spears, :
Defendants-Appellants. :

- -x

Order

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate with the continuance of appellant's release at liberty pending determination of this petition having been filed herein by counsel for the appellant John Tortora,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

s/ Sterry R. Waterman
STERRY R. WATERMAN

s/ Paul R. Hays
PAUL R. HAYS

s/ Wilfred Feinberg
WILFRED FEINBERG

June 19, 1972

Opinion

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 725, 726, 727—September Term, 1971.

(Argued April 20, 1972 Decided May 22, 1972.)

Docket Nos. 71-2123, 71-2126, 72-1108

Opinion

- -x

UNITED STATES OF AMERICA,

:

Appellee,

:

-against-

:

JOHN IANNELLI, JOHN TORTORA, a/k/a Johnny T., and FRANK SQUIRES, a/k/a Frank Spears,

:

Defendants-Appellants.

- -x

Before:

WATERMAN, HAYS and FEINBERG,
Circuit Judges.

Appeals from judgments of conviction, entered September 16, 1971 in the United States District Court for the Southern District of New York, Lawrence W. Pierce, J., for conspiracy to misapply the funds of a federally insured bank, 18 U.S.C. §§656 and 371, and for aiding and abetting the misapplication of such funds, 18 U.S.C. §§656 and 2.

Judgments of conviction affirmed.

Irving Anolik, New York, N.Y. (Lanna, Coppola & Rosato, on the brief), for Defendant-Appellant Iannelli.

David A. Pravda, New York, N.Y., for Defendant-Appellant Tortora.

Phylis Skloot Bamberger, New York, N.Y. (Robert Kasanof, The Legal Aid Society, on the brief), for Defendant-Appellant Squires.

Robert T. Hartmann, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York; John W. Nields, Jr., Assistant United States Attorney, on the brief), for Appellee.

FEINBERG, Circuit Judge:

John Iannelli, John Tortora and Frank Squires appeal from judgments of conviction entered on September 16, 1971 in the United States District Court for the Southern District of New York after a four day jury trial before Lawrence W. Pierce, J. Appellants were each found guilty on one count of conspiring to misapply the funds of a federally insured bank, 18 U.S.C. §§656 and 371, and on five counts of aiding and abetting the mis-

application of such funds, 18 U.S.C. §§656 and 2.[1] We affirm the convictions.

I.

The origins of this case date back to 1965. At that time, appellant John Iannelli had both a personal checking account and outstanding commercial loans with the County Trust Company in Yonkers, New York. Walter J. Michaels, an assistant treasurer at the bank, had handled these loans on the bank's behalf. In April 1965, Michaels met with the bank's regional vice president to discuss Iannelli's indebtedness. The vice president instructed Michaels not to loan any further money to Iannelli. That instruction, however, proved futile; several schemes, including the one charged as unlawful here, were devised to circumvent the rule. The details of those schemes were provided by Michaels himself, who was named as a defendant in the indictment but pleaded guilty prior to the commencement of the trial and agreed to testify for the Government.

At first, Michaels manipulated the bank's records so that Iannelli's personal account would not show substantial overdrafts. Michaels' efforts were helped in March 1966 when Iannelli opened another account with the bank under the name

1. Squires was sentenced to concurrent terms of imprisonment of one year on each count; Tortora was sentenced to concurrent terms of imprisonment of 18 months on each count; and Iannelli was sentenced to concurrent terms of imprisonment of 18 months on three counts (the conspiracy count and two substantive counts) and given a suspended sentence and a period of probation on the remaining three counts.

Sioux Realty Construction Corporation with Iannelli and his wife listed as corporate officers and signatories. There is evidence in the record that both Iannelli and Tortora were owners of Sioux and that Squires was "Field Manager" of the company. In any event, Michaels used the Sioux account to protect Iannelli's personal checking account from appearing to be overdrawn. Michaels further testified that during this period he met once with Iannelli alone and twice with Iannelli and Tortora to discuss these juggling maneuvers. The latter two meetings were arranged by Squires, who phoned Michaels using the name "Spears."

On April 6, 1966, Squires again called Michaels to arrange another meeting at the offices of Sioux Realty. Present at the meeting were Iannelli, Tortora and Michaels; apparently Squires was there but left shortly after Michaels arrived. During the course of the ensuing discussion a new plan for extending the bank's credit to Iannelli was agreed upon: Iannelli and Tortora promised to send five individuals to the bank to whom the bank would make loans through Michaels, who was then to take the proceeds and credit the Sioux account. It was this scheme that formed the basis of the indictment.

The following day Squires appeared at the bank to take out a loan under the pseudynom "Spears." Michaels filled in the amount ($2,500) and the purpose of the loan (to purchase a 1963 Cadillac) although Squires already owned such an automobile and Michaels knew it. When Michaels gave Squires a check for $2,500, Squires immediately

cashed it and returned the money to Michaels. Later Michaels deposited the money in Iannelli's accounts. According to Michaels' testimony, a similar scenario was followed when each of the four other straw men for Iannelli came to the bank to borrow funds. During this period of sham loans Iannelli and Tortora also met with Michaels on two more occasions to discuss their financial manipulations. As before Squires contacted Michaels to notify him of the meetings.

The auditor of the bank estimated at trial that, as a result of all these events, the total amount loaned to various people was $69,000, which remained outstanding at the time he testified.

II.

Appellants raise several arguments for reversing their convictions. Since in our view only the arguments advanced by Squires are substantial enough to warrant extended discussion, we only briefly consider the contentions of appellants Iannelli and Tortora before moving on to discuss Squires' arguments.

Both Iannelli and Tortora argue that there is insubstantial evidence in the record to support their convictions and that the nearly five-year delay between the Government's discovery of the alleged unlawful acts and the return of the indictment violated the Sixth Amendment speedy trial clause, the Fifth Amendment due process clause and Fed. R. Crim. P. 48(b). As to the claim of insufficient evidence, we think it clearly refuted

by the summary of the Government's case given in Part I of this opinion. With regard to the claim of pre-indictment delay, appellants are foreclosed by United States v. Marion, 404 U.S. 307 (1971), from resting their argument on either the Sixth Amendment or Rule 48(b). And to succeed under the Fifth Amendment due process clause they must at least show that they suffered actual prejudice in preparing a defense. See United States v. Marion, supra, at 324-26;[2] United States v. Briggs, slip op. 2459, 2463, ___ F.2d ___, ___ (2d Cir. Mar. 29, 1972); United States v. Capaldo, 402 F.2d 821, 823 (2d Cir. 1968), cert. denied, 394 U.S. 989 (1969). A determination of the constitutional issue in this context requires, in the words of Justice White, "a delicate judgment based on the circumstances of each case." United States v. Marion, supra at 325. The circumstances of this case, we believe, dictate a finding that the delay did not result in a constitutional violation. Iannelli concedes that actual prejudice has not been "conclusively demonstrated";[3] and Tortora

2. In rejecting petitioner's claim that the pre-indictment delay violated the due process clause, the Court in Marion stated that "No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them." United States v. Marion, supra, 404 U.S. at 325. It is unclear from the opinion whether a successful claim under the due process clause must establish both actual prejudice and intentional delay on the part of the Government or whether a showing of the former alone would be sufficient. In any event, neither appellant has made a substantial claim that there was prosecutorial gamesmanship here.

3. Appellant's Brief at 25.

claims only that he might have found witnesses among those present at a bar during one of the meetings between Iannelli, Michaels and himself who would have contradicted Michael's version of that event. Under the facts of this case, appellants' claims of prejudice are too speculative for us to say that they have been deprived of a fair trial. We also note that the Government explained in an affidavit submitted to the trial court that the reason for the delay was "that the events in this indictment were but a small part of an investigation into allegations against these defendants of extortion activities in Yonkers, New York, from 1966 through 1970." Such a reason is certainly a "legitimate consideration in law enforcement." United States v. Briggs, supra at slip op. 2464.

The remaining arguments of these appellants are that Iannelli's motion for acquittal should have been granted because Michaels' testimony "substantially exonerated" him and that Tortora was prejudiced by one of the prosecutor's remarks during summation and by the judge's charge regarding it. These claims are simply without merit.

Squires' arguments in this court, on the other hand, are more substantial. His principal claim is that the Government failed to satisfy its burden of showing that he knowingly joined with Michaels in wilfully misapplying the bank's funds with intent to injure or defraud the bank. See United States v. Fortunato, 402 F.2d 79, 80 (2d Cir. 1968), cert. denied, 394 U.S. 933 (1969); Benchwick v. United

States, 297 F.2d 330, 332 (9th Cir. 1961). His participation as a straw man in the April 7 loan transaction, he asserts, cannot support the inference that he knew that Michaels would apply the loan proceeds to Iannelli's benefit or that such application would violate the bank's policies. Thus, Squires concludes, the trial court improperly refused to grant his motion for entry of a judgment of acquittal.

We are unpersuaded by these arguments.[4] The inference is very strong that Squires went to the bank on April 7 to borrow money at Iannelli's behest. Equally clear, we think, is that the jury was entitled to conclude from the evidence before it that Squires knew the loan proceeds were to be used for Iannelli's benefit. Squires had arranged meetings between Iannelli and Michaels on several occasions; and, as already indicated, when he went to the bank on April 7 he did so at Iannelli's direction. Moreover, his apparent readiness to sign, under an assumed name, the fraudulent loan application and then immediately transfer the funds to Michaels suggests at least that Squires

4. We need not decide here whether the proper standard of review in this case is, as appellant contends, the one stated in United States v. Glasser, 443 F.2d 994, 1006 (2d Cir.), cert. denied, 404 U.S. 854 (1971) (whether "there is 'relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt, that the accused is guilty'") or that formulated by Judge Hand in United States v. Feinberg, 140 F.2d 592, 594 (2d Cir.), cert. denied, 322 U.S. 726 (1944) (whether there is "substantial evidence" to support a finding of guilt) and recently reaffirmed by a panel of this court in United States v. Coblentz, 453 F.2d 503, 506 (2d Cir. 1972), since we believe the evidence is sufficient to sustain the conviction under either standard.

knew Iannelli was to be a beneficiary of this charade. It could hardly be said that Squires expected Michaels to keep the money Squires had just transferred to him. We also think that there was sufficient support for the jury's conclusion that Squires knew at the time that Michael's actions were contrary to the bank's rules. The Government, of course, was not required to show that Squires knew that Michaels was violating a specific directive from the bank's regional vice president. It was sufficient to show only that Squires knew that Michaels' actions in transferring the money to Iannelli somehow constituted a breach of the bank's rules. See Benchwick v. United States, supra, 297 F.2d at 332-33. Again, Squires' unquestioning participation in the obviously fraudulent loan transaction supports an inference of knowledge of irregularity. Thus, we think that the record in this case, when considered as a whole, supports the inference that Squires shared the intent of Michaels to injure or defraud the bank and to get money improperly into the hands of Iannelli. The evidence of guilty knowledge in this case, in our view, is much greater than was true in those decisions relied on by appellant. See Ingram v. United States, 360 U.S. 672 (1959); United States v. Stromberg, 268 F.2d 256 (2d Cir.), cert. denied, 361 U.S. 863 (1959); Morei v. United States, 127 F.2d 827 (6th Cir. 1942).

One further question remains: whether the evidence was sufficient to establish that Squires was aware that the scheme to misapply the bank's funds went beyond his one loan transaction and

involved other similar illegal acts. The question is important because Squires was convicted of being a conspirator in a scheme involving four other instances of misapplication similar to his own and of being an aider and abetter in each of those misapplications. To be sure, a person shown to have joined a conspiracy can be held liable not only for the conspiracy but also for all substantive offenses committed by his fellow co-conspirators in furtherance of the conspiratorial objectives. See Pinkerton v. United States, 328 U.S. 640, 646-47 (1946). The applicability of that rule to a given case, however, depends upon the Government's showing that the defendant had some reason to believe that the conspiracy was broad enough to encompass those acts.

Although the question in this case is close, we think the evidence was sufficient on this issue. Squires maintains that he was, in effect, a minor employee ignorant of the schemes of Iannelli and Tortora, but there was evidence to the contrary. The loan application listed Squires as "Field Manager" of Sioux Realty. As already indicated, Squires obtained $2,500 in a false transaction to obtain money for Iannelli's use. Moreover, Squires knew that the conspiracy included not only Iannelli and Michaels but also Tortora. Indeed, on one occasion Squires called Michaels to arrange a meeting between Michaels and Tortora at a cafe and to say that Tortora had a check he wanted deposited in the Sioux account. Thus, Squires had reason to believe that something peculiar was going on involving the bank and Tortora, as well

as the bank and Iannelli. It is not ordinarily necessary for a depositor to meet a bank official in a cafe to make a deposit. Also of significance is the fact that Squires arranged further meetings between Iannelli and Tortora and Michaels after his April 7 loan, supporting the inference that Squires knew he was part of a continuing conspiracy. It is true that considered alone each of these bits of evidence might be insufficient to prove the requisite knowledge. But we need not consider them in isolation, and together they were enough to put the issue to the jury.

The judgments of conviction are affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-117

JOHN IANNELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the Southern District of New York of aiding and abetting the misapplication of funds of a federally insured bank and of conspiracy to commit that offense. He was given concurrent sentences of imprisonment for 18 months on three counts and a suspended sentence with probation on the other counts. The court of appeals affirmed the conviction on May 22, 1972 (Pet. App. 1a-2a) with an opinion (Pet. App. 4a-14a) that sets forth the evidence in some detail. A petition for rehearing was denied on June 19, 1972. The

petition for a writ of certiorari, filed on July 21, 1972, is out of time under Rule 22-2 of the rules of this Court.

The petition does not in any event present an issue worthy of review. The evidence detailed in the opinion below, showed, *inter alia*, that after the bank's regional vice president had instructed Michaels, an assistant treasurer of the bank, not to make any more loans to petitioner, petitioner and co-defendant Tortora arranged with Michaels to send five "straw men" to the bank to obtain loans which would go into the petitioner's corporate account (Pet. App. 6a-8a). In light of these facts, the contention that Michaels' testimony exonerated petitioner is, as the court below said, "simply without merit" (Pet. App. 10a). As the court also held (Pet. App. 9a), the delay in returning an indictment was not a basis for dismissal, since petitioner made no showing of prejudice and the government offered an appropriate explanation for the interval. See *United States* v. *Marion*, 404 U.S. 307.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

☆ U.S. Government Printing Office: 1972—474-654/1941